IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

HUMANA INC.,	)	
Plaintiff,	)	
v.	)	Case No. 2:14-cv-02405-JTF-cgc
MEDTRONIC SOFAMOR DANEK USA, INC. and MEDTRONIC, INC.,	)	
Defendants.	)	

ORDER DENYING MOTION TO FILE SECOND AMENDED COMPLAINT

On October 23, 2014, Plaintiff filed its first Motion to Amend Complaint ("FAC"), which was granted by this Court on November 10, 2014. (ECF No. 30). Before the Court now is Plaintiff's Motion For Leave to File Second Amended Complaint ("SAC"), filed on October 23, 2015. (ECF No. 53). This motion was prompted by the Court's order entered on September 25, 2015.[1] On November 6, 2015, Defendants filed a Response in Opposition, ECF No. 54, to which Plaintiff replied on December 8, 2015. (ECF No. 57). After reviewing the Motion, Response and Reply, the Court DENIES Plaintiff's Motion for Leave to file Second Amended Complaint.

I. LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 15(a)(2), "[T]he court should freely give leave when justice so requires." However, the right to amend is not absolute, and a court may deny leave based on a

[1] The Court Dismissed Counts 1-10, and Count 16 in the Order on the Motion to Dismiss. (ECF No. 51). When dismissing Counts 1-10 and Count 16, the Court found that the Plaintiff's Complaint "fails to provide sufficient factual allegation to cross the plausibility threshold." (ECF No. 51 p.7). In dismissing the subrogation claim, the Court found that the FAC failed to provide 'individual insureds for Plaintiff to step into their shoes," and a specific amount to paid to the insured. *Id.* at 8.

finding of "undue delay, bad faith, dilatory motive, or futility." *Crestwood Farm Bloodstock v. Everest Stables, Inc.*, 751 F.3d 434, 44 (6th Cir. 2014); *Tucker v. Middleburg-Legacy Place*, 539, F.3d 545, 551. The grant or denial of an opportunity to amend is within the discretion of the court. *See Foman v. Davis*, 371 U.S. 178, 182; *Crestwood*, 751 F.3d at 444 (stating that the lower court's denial of a motion to amend cannot be overturned unless the court abused its discretion). A motion to amend is futile when the proposed amendment is insufficient for the complaint to survive a 12(b)(6) motion. *See Neighborhood Development Corp v. Advisory Council on Historic Preservation, Dept. of Housing and Urban Development*, 632 F.2d 21, 23 (6th Cir. 1980). Courts must also consider whether granting a motion under Rule 15 would result in undue delay—particularly if the moving party is attempting to incorporate evidence that was previously available. *See Leisure Caviar, LLC v. U.S Fish and Wildlife Service*, 616 F.3d 612, 616 (6th Cir. 2010); *See Hafer v. Medtronic, Inc.*, 99 F. Supp.3d 844, 856 (W.D. Tenn. 2015).

II. ANALYSIS

Plaintiff seeks to amend its First Amended Complaint ("FAC") and proceed with a Second Amended Complaint ("SAC") that cures the deficiencies in Counts 1-5. Counts 1-4 are the Plaintiff's claim of fraudulent miscoding. Count 5 is the subrogation claim based on alleged complications from the "off-label" use of bone morphogenetic protein ("BMP"). (ECF No. 53-1 p. 1). The Court will address the proposed amendments below.

The Plaintiff asserts that the SAC rectifies the deficiencies of the FAC identified by the Court's Order on the Defendants' Motion to Dismiss.[2] (ECF No. 51). First, Plaintiff claims that they have sufficiently identified the speakers of the fraud as the Defendants' sales representatives. (ECF No. 53-1 p. 2). Second, Plaintiff avers that the SAC connects Defendants to specific practices that resulted in fraudulent billing. *Id.* at 2. Third, Plaintiff alleges more details regarding the seminars conducted by the Defendants, and the particular communications made by the Defendants to Providers that led to the fraudulent coding. *Id.* Fourth, Plaintiff claims that the SAC presents many more examples of fraudulent miscoding with greater specificity than the examples the Court found deficient in the FAC. *Id* at 5. Last, Plaintiff asserts that the subrogation claim is valid because they identified over one hundred members who required subsequent treatment due to off-label BMP use. (ECF No. 56-1 p. 4).

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[2] *See supra* Note 1.

a. **Counts One Through Four**

Claims alleging fraud must meet the particularity requirements of Rule 9(b) in order to survive Rule 15. *See PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 681 (6th Cir. 2004). Fed. R. Civ. P. Rule 9(b) imposes a heighten standard on claims of fraud, requiring Plaintiffs to: "(1) specify the statement that the plaintiffs contend were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *See Frank v. Dana Corp*, 547 F.3d 564, 570 (6th Cir. 2008) (finding at minimum, Plaintiffs must specify the time, place, and contents of the misrepresentations they relied on); *Heinrich v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393, 404 (6th Cir. 2012) (stating that Plaintiffs argument had no merit because it did not adequately allege that the person making the representations acted with knowledge or reckless disregard of their falsity). *Id.* Moreover, any alleged RICO claims must show that the Defendants' conduct was the proximate cause of injury. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (2012). If the Plaintiff's claims fail under the particularity requirements imposed by Rule 9(b), then they do not survive a 12(b)(6) Motion to Dismiss.

Plaintiff avers that the SAC satisfies the particularity requirements imposed by Rule 9(b). As noted above, Plaintiff proffers four reasons why the SAC should survive Rule 9(b). First, Plaintiff has identified the speakers of the fraud as the Defendants' sale representatives. Second, the SAC connects the Defendants to the fraudulent billing codes. Third, the SAC alleges more details regarding the seminars and particular communications made by the Defendants. Fourth, Plaintiff identifies many more examples of miscoding with greater specificity than the FAC.

Defendants respond that the SAC is insufficient because it fails to create a plausible connection between the Defendants' specific conduct and the alleged fraudulently miscoded claims. (ECF No. 54 p. 3). Moreover, Defendants argue that the SAC does not provide the names of specific sales representatives as mandated by Rule 9(b). *Id.* at 3. Defendants also assert that the information provided regarding the seminars is insufficient because it fails to indicate specific fraudulent statements made by the Defendants. The Court agrees with the Defendants that the SAC fails to cure the deficiencies of the FAC with respect to Counts 1-4.

Plaintiff provides no specific names of Defendants' sale representatives that allegedly carried out the fraud. Plaintiff argues that *U.S. ex rel. Bledsoe v. Cmty. Health Sys. Inc.,* 501 F.3d 493, 506 (6th Cir. 2007), enables them to use only the name of the Defendant. It is true that *Bledsoe* indicates that under certain circumstances specific names of employees may not be necessary to satisfy rule 9(b).[3] However, as this Court explained in its previous order dismissing these claims, Defendants argue persuasively that "[w]hile fraud may be pled on information and belief when the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge, the plaintiff must still set forth the factual basis for his belief. *Id.* (quoting *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 512 (6th Cir. 2007)); *Sanderson v. HCA-*

[3] "To reiterate, in order to surmount the hurdle of Rule 9(b), a relators complaint must "allege the time, place, and content of the alleged misrepresentation to which he or she relied. . . . [N]otably absent from this list of requirements is the identity of the employee who allegedly made the representation." *See Bledsoe*, 501 F.3d at 508.

the Healthcare Co., 447 F.3d 873, 878 (6^{th} Cir. 2006) (stating that pleadings on information and belief "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations")." (ECF No. 51 at pp.12-13). Basically, although more information has been presented, Plaintiff still fails to satisfy Rule 9(b). In viewing the SAC, Plaintiff only presents conclusory allegations with respect to the existence of a fraudulent billing scheme. Further, Plaintiff's allegations require the Court to speculate as to the Defendants' involvement in the alleged scheme to defraud.

Additionally, the billing codes provided by Plaintiff were entered by independent third party providers, not the Defendants. Plaintiff provides no communications indicating that the Defendants created a fraudulent scheme or induced the fraudulent coding.[4] Without any additional information, it is equally or more plausible that the miscoded billing statements were routine mistakes or errors made by the third party providers.[5] While the dates associated with the alleged fraudulent submissions are presented, the Plaintiff fails to establish a causal nexus between the Defendants' actions, and the miscoded billing statements.

Plaintiff also provides new information regarding webinars and seminars hosted by the Defendants for third party providers. The new information includes some of the written materials distributed at the seminars. (ECF No. 53-2). However, Plaintiff still fails to provide specific communications or actions on the part of the Defendants that encouraged providers to commit fraud. The SAC alludes to the materials distributed at the seminars, but again fails to identify any specific statements that encouraged or directed providers to participate in a fraudulent scheme. It

[4]The proposed amendments in the SAC provide examples of miscoding that provide the wrong code, the date and time of the miscoding, the provider who entered the code, and Hospital where the charged procedure took place. (ECF No. 53-2). However, there is no connection to any statements or actions taken by employees of the Defendant.

[5] The Defendants make a veritable argument that the processing of assigning codes is complex and introduces numerous opportunities for mistakes. (ECF No. 54 n. 2).

appears that the SAC has not rectified the deficiencies in the FAC. Plaintiff has only provided more information that still fails to establish what fraudulent acts or statements were made by the Defendants. Plaintiff's arguments rest on the belief that the billing codes are the specific fraudulent statements and the Defendant is the speaker. However, the codes were not entered by an employee of the Defendant. The codes were entered by independent third party providers. Without some specificity regarding acts or statements from the Defendant, the claim cannot satisfy Rule 9(b). Moreover, Plaintiff has offered no evidence that the Defendants possessed the scienter necessary for a successful fraud claim. *See Heinrich,* 668 F.3d at 406 ("Rule 9(b) requires. . . .identifying a basis for inferring scienter.).

The SAC fails to satisfy any of the requirements of Rule 9(b). Providing billings that were not entered by the Defendants, without more, are just conclusory allegations. Plaintiff has not provided specific names of sale representatives, or specific statements made to induce the alleged fraudulent behavior. If a claim of fraud cannot meet the particularity requirements established by 9(b), it cannot survive a 12(b)(6) motion, rendering the claim futile.[6] Therefore, the Court finds the claim is futile and DENIES Plaintiff Motion to Amend for counts 1-4.

b. **Count Five**

The Court previously dismissed Plaintiff's subrogation claims because they failed to identify the individuals insured, and failed to establish subject matter jurisdiction. (ECF No. 44). Plaintiff contends that the SAC rectifies those deficiencies. The SAC provides a list with the member ID number, dates of service, total amount paid, provider and state of the insured. (ECF

[6] Defendants also argue that if the Court finds the SAC sufficient under Rule 9(b) and Rule 15, then the complaint should be dismissed because it is time barred. (ECF No. 54 p. 10). The Defendants posit that the Plaintiffs allege they were aware of the fraudulent billing coding in the latter half of 2011, which would put them outside of the three limitations. However, since the Court finds the common law fraud claims deficient on their face, the issues of the Statute of Limitations need not be addressed.

No. 53-2 p. 81-82). As Defendants correctly argue, the SAC still fail to address the issues of preemption, and to identify 'a specific debt' or 'payment to its insured' with regard to the subrogation claims. Even with the proposed amendments to the SAC, the Plaintiff has again failed to address the issue of preemption or federal jurisdiction. Additionally, the new information provided regarding Plaintiff's insured still lacks the specificity necessary for a valid subrogation claim.[7] As such, the Court DENIES the Plaintiff's Motion to Amend Count 5 of their complaint.

The Court finds that Plaintiff's Motion to File Second Amended Complaint should be DENIED.

IT IS SO ORDERED this 19th day of April, 2016.

s/John T. Fowlkes, Jr.___
JOHN T. FOWLKES, JR.
United States District Judge

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[7] To allege a valid subrogation claim Plaintiffs must show:

> ". . . .[T]hat the insureds are entitled to recover, that the plaintiffs have a contractual right to proceed on each insureds behalf with respect to each claim, and that the suits all fall within federal jurisdiction."

Quoting *Health Care Serv. Corp. v. Brown & Williamson Tobacco Corp.*, 208 F.3d 579, 581 (7th Cir. 2000).